Siong Holdings Sdn Bhd v Development & Commercial Bank Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W–02–307–1995
MAHADEV SHANKAR, ABU MANSOR AND ABDUL MALEK AHMAD JJCA
6 NOVEMBER 1996

Land Law *— Sale of land — Order for — Conclusive evidence clause — Dispute as to the accuracy of amount owed — Whether chargee need to prove amount owed — Whether court could grant order for sale based on conclusive evidence clause — Whether duty of court to adjudicate upon substantive issue — National Land Code 1965 s 254*

The appellant was the registered owner of a piece of land ('the land') which was charged to the respondent by way of security for the repayment of a banking facility granted to the appellant. Clause 14 of the charge agreement provided that the statement of an officer of the respondent shall be final and conclusive ('the conclusive evidence clause'). The respondent issued a Form 16D under s 254 of the National Land Code 1965 ('the NLC') when the appellant failed to settle the amount owing under the facility. The respondent subsequently applied for foreclosure under s 254 of the NLC. The trial court granted the order for sale based on the conclusive evidence clause and held that it was not the duty of the court to ascertain the accuracy of the amount due to the respondent. The appellant appealed and argued that the court ought not to have adjudicated based on the conclusive evidence clause as the guarantor had no knowledge of the details of the account.

Held, dismissing the appeal:

Following the principle laid down in *Kandiah Peter v Public Bank Bhd* [1994] 1 MLJ 119, the conclusive evidence clause was applicable and therefore there was no need for the respondent to prove the amount owed by the appellant. The court hearing the application for foreclosure does not make, or in any event ought not to make, any adjudication upon any substantive issue. All the respondent had to show in order to obtain an order for sale in foreclosure was the fact of the inability of the appellant to settle the loan. Likewise, the alleged incorrect account of the respondent was also irrelevant to the case. If, as alleged by the respondent, there was a discrepancy in the conclusive evidence clause, it could only be resolved in a separate claim. To go outside the principle of the conclusive evidence clause was to negate the principle in *Kandiah*'s case (see pp 343B and 344A–C); *Kandiah Peter v Public Bank Bhd* [1994] 1 MLJ 119 followed.

[Bahasa Malaysia summary

Perayu merupakan tuan punya berdaftar sebidang tanah ('tanah tersebut') yang digadaikan kepada penentang sebagai cagaran untuk

bayaran balik kemudahan kewangan yang diberikan kepada perayu. Fasal 14 perjanjian gadaian memperuntukkan bahawa pernyataan seorang pegawai bagi pihak penentang haruslah yang terakhir dan muktamad ('fasal keterangan muktamad'). Penentang mengeluarkan Borang 16D di bawah s 254 Kanun Tanah Negara 1965 ('KTN') apabila perayu gagal menjelaskan amaun yang terhutang di bawah kemudahan itu. Penentang kemudiannya memohon penutupan di bawah s 254 KTN. Mahkamah perbicaraan memberikan perintah untuk jualan berdasarkan fasal keterangan muktamad dan memutuskan bahawa ia bukanlah tugas mahkamah untuk menentukan ketepatan amaun yang terhutang kepada penentang. Perayu membuat rayuan dan berhujah bahawa mahkamah tidak patut menghakimi berdasarkan fasal keterangan muktamad oleh kerana penggerenti tidak tahu akan butir akaun itu.

Diputuskan, menolak rayuan:

Menurut prinsip yang dinyatakan dalam *Kandiah Peter v Public Bank Bhd* [1994] 1 MLJ 119, fasal keterangan muktamad terpakai dan oleh itu tiada keperluan untuk penentang membuktikan amaun yang terhutang oleh perayu. Mahkamah yang mendengar permohonan untuk penutupan tidak membuat, atau dalam apa keadaan pun tidak patut membuat, apa-apa penghukuman ke atas sebarang isu substantif. Apa yang perlu ditunjukkan oleh penentang bagi memperolehi perintah untuk jualan dalam penutupan adalah fakta ketidakupayaan perayu untuk menjelaskan pinjaman. Akaun penentang yang dikatakan tidak betul juga tidak relevan kepada kes. Jika, sebagaimana yang dikatakan oleh penentang, terdapatnya suatu perselisihan dalam fasal keterangan muktamad, ia hanya boleh diselesaikan dalam tuntutan yang berasingan. Melampaui prinsip fasal keterangan muktamad akan bermakna prinsip dalam kes *Kandiah* disangkal (lihat ms 343B dan 344A–C); *Kandiah Peter v Public Bank Bhd* [1994] 1 MLJ 119 diikut.]

Notes

For cases on order for sale of land, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1471–1500, 2605–2670.

Case referred to

Kandiah Peter v Public Bank Bhd [1994] 1 MLJ 119 (folld)

Legislation referred to

National Land Code 1965 s 254, Form 16D

Appeal from: Originating Summons No S2–24–1092–1993 (High Court, Kuala Lumpur)

D Krishna (*Francis Lim & Co*) for the appellant.
Low Kim Leng (*Soo Thien Ming & Shahrizat*) for the respondent.

Abu Mansor JCA (delivering the judgment of the court): This is an appeal against the decision of the High Court, Kuala Lumpur on 14 April 1995 giving leave to the respondent to sell by public auction the land charged by the appellant to the respondent. We heard arguments on 21 August 1996 at the end of which we dismissed the appeal with costs.

The simple facts of the case were as follows. The appellant was the defendant ('the defendant') and the respondent was the plaintiff ('the plaintiff'). The defendant who was the registered owner of land held under Grant 9994, Lot 1167, Section 41, District of Kuala Lumpur ('the land') had charged the said land to the plaintiff by way of security for the repayment of a banking facility granted to the defendant. When the defendant failed to settle the amount owing, the plaintiff issued Form 16D dated 7 September 1993 under s 254 of the National Land Code 1965 ('the Code') in order to have the land sold to realize the debt.

The defendant failed to settle the debt. Thereafter, the plaintiff applied for foreclosure under s 254 of the Code. Inspite of the defendant's objection, the learned judicial commissioner granted the order for sale. Hence, this appeal by the defendant.

Shortly, the main issue of the defendant's appeal turned on the proper implementation of the 'conclusive evidence clause'. The defendant contended that the court ought not to have adjudicated based on the conclusive evidence clause by reason of the fact, they say, that the guarantor was protesting that they had no knowledge of the details of the account. In doing so, the court had acted in error.

At p 53 of the appeal record, the learned judicial commissioner held:

> Berhubung dengan isu pertama ini, saya memutuskan mahkamah ini terikat dengan penghakiman Mahkamah Agung dalam kes *Kandiah*. Saya juga memutuskan fasal 14 membolehkan plaintif mengeluarkan penyata berhubung dengan jumlah yang terhutang dan plaintif dilepaskan dari beban untuk membuktikan keterhutangan itu. Mahkamah ini perlu menerima kenyataan keterhutangan yang telah dikeluarkan oleh plaintif sebagai konklusif dan tidak menjadi tanggungjawab mahkamah ini untuk mengesahkan ketepatan jumlah tersebut.

Roughly translated thus:

> Having regard to the first issue, I rule that this court is bound by the judgment of the Supreme Court in the case of *Kandiah*. I also rule that cl 14 enables the plaintiff to issue a statement relating to the amount due and the plaintiff is relieved of the burden of proving the debt owing. This court shall accept the amount of the debt owing issued by the plaintiff as conclusive and it shall not be the duty of this court to ascertain the accuracy of the said amount.

The learned judicial commissioner followed the principle laid down in *Kandiah*'s case by which the learned judicial commissioner, following the principle of judicial precedents, was bound. In the case of *Kandiah Peter v Public Bank Bhd* [1994] 1 MLJ 119, Eusoff Chin SCJ (now Chief Justice) held very clearly as follows (at p 122):

A chargee who makes an application for an order for sale in foreclosure proceedings under s 256 of the Code does not commence an action. He merely enforces his rights as a chargee by exercising his statutory remedy against the chargor in default. The chargee, therefore, does not sue for a debt. It is also clear that his claim for an order for sale is not based upon a covenant but under the registered charge. The order for sale when made under s 256 of the Code is not a judgment or a decree. The court hearing the application for foreclosure does not make, and in any event ought not to make, any adjudication upon any substantive issue. These principles are culled from several decisions of our courts which have correctly stated the law upon the subject.

Mr Low Kim Leng for the plaintiff submitted that the appellate court, in considering the defendant's submission, had to start with the principles in *Kandiah*'s case in mind. We found merit in that argument. Apart from that, we also uphold his contention and took note that all the defendant's alleged points of dispute were never ventilated in the court below.

When the plaintiff's counsel was asked by this court to show us the correctness of the plaintiff's account in the face of the apparent challenge by the defendant, we were firmly assured and were satisfied by the submission of the plaintiff's counsel that neither the borrower nor the chargor of the land had ever disputed their accounts with the plaintiff. This account in October 1993 at pp 201 and 203 of the appeal record were produced without protest by the defendant themselves. These figures at pp 201 and 203 tally with the figures in the affidavit filed by the plaintiff at pp 143–145 of the appeal record. The plaintiff's counsel submitted further that if the defendant had seriously contended all the alleged errors, the defendant should have filed an affidavit in reply both in respect of the alleged errors and the different rates of interest which were never ventilated in the court below. We also took note of the plaintiff's counsel's submission that there was no dispute as regards the principal advanced. Whatever mistake there was, it was in the computation of the overdraft. What was most important was that the mistake was made after the service of the Form 16D and therefore irrelevant for our consideration. He submitted further that the figure in Form 16D was conclusive. Clause 14 of the charge annexure provides:

14 If and when the said account or accounts shall be closed pursuant to cl 13 and a balance shall then be owing to the chargee by the Borrower, the chargor or its legal representatives or successors in title or assigns as the case may be, shall so long as the same or any part thereof shall remain owing and notwithstanding the chargee having obtained an order of sale under the National Land Code, pay to the chargee interest thereon at the rate prevailing at the date that the said account or accounts are closed, with monthly rests, computed from the time when such balance shall have been ascertained and the chargor agrees that the statement of the manager, assistant manager, accountant or other officer of the chargee as to the amount of such balance, such balance shall be final and conclusive.

Likewise, we are bound by the decision in *Kandiah*'s case and we find no reason to disturb the decision of the learned judicial commissioner. Touching on the merit of the complaint, we have no hesitation in saying that the ground was without merit. We hold that the conclusive evidence clause applies and therefore there was no need for the plaintiff to prove the amount. All the plaintiff had to show in order to obtain an order for sale in foreclosure was the fact of the inability of the defendant to settle the loan. As to the allegation of the defendant that the plaintiff's account had been incorrect, following *Kandiah*'s case again, this issue must be regarded as irrelevant. If, as alleged by the defendant, there is a discrepancy in the conclusive evidence clause, it can only be resolved in a separate claim by him but to go outside the principle of the conclusive evidence clause, we hold, is to negate the principle in *Kandiah*'s case.

We therefore dismiss this appeal with the order that the deposit is to go to the account of the plaintiff's taxed costs.

Appeal dismissed.

Reported by Rudeen Chua